



Billing Code 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 130716626-3805-01]

RIN 0648—BD51

Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Upper Columbia Spring-run Chinook Salmon in the Okanogan River Subbasin, Washington, and Protective Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; open comment period; notice of availability.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose a rule to designate and authorize the release of a nonessential experimental population (NEP) of Upper Columbia River spring-run (UCR) Chinook salmon (*Oncorhynchus tshawytscha*) under section 10(j) of the Endangered Species Act (ESA) in the Okanogan River subbasin, and to establish a limited set of take prohibitions for the NEP. Under the proposed rule, the geographic boundary for the NEP would be the mainstem and all tributaries of the Okanogan River between the Canada-United States border and to the confluence of the Okanogan River with the Columbia River, Washington (hereafter “Okanogan River NEP Area”). We have prepared a draft environmental assessment (EA) on this proposed action. We seek comment on both this proposed rule and the EA (see ADDRESSES section below).

DATES: To allow us adequate time to consider your comments on this proposed rule, they must be received no later than [Insert date 45 days after publication in the FEDERAL REGISTER].

Comments on the EA must be received by [Insert date 45 days after publication in the FEDERAL REGISTER]. One public meeting will be held at which the public can make comments on the draft EA and proposed rule. The meeting will be at Koala Street Grill, banquet room, 914 Koala Avenue, Omak, WA, 98841, on November 5 from 5:30 p.m. to 7:30 p.m.

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA-NMFS-2013-0140, by any of the following methods:

- **Electronic submissions:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0140>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to Chief, Protected Resources Division, NMFS, 1201 NE Lloyd Blvd. - Suite 1100, Portland, OR 97232.
- **Fax:** (503) 230-5441

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

You may access a copy of the draft EA by one of the following:

- Visit NMFS' Reintroduction website at:
http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/salmon_and_steelhead_listings/chinook/upper_columbia_river_spring_run/upper_columbia_river_spring_run_chinook.html
- Call (503) 736-4721 and request to have a CD or hard copy mailed to you.
- Obtain a CD or hard copy by visiting NMFS, 1201 NE Lloyd Blvd. Suite 1100, Portland, OR 97232.

Please see the draft EA for additional information regarding commenting on that document.

FOR FURTHER INFORMATION CONTACT: Garth Griffin, NMFS, Northwest Region, Portland, OR (503-231-2005) or Dwayne Meadows, NMFS, Office of Protected Resources, Silver Spring, MD 20910 (301-427-8403).

SUPPLEMENTARY INFORMATION:

Background Information Relevant to Experimental Population Designation

The UCR Chinook salmon evolutionarily significant unit (ESU) is listed as an endangered species under the ESA (16 USC 1531 *et seq.*). NMFS first designated the UCR Chinook salmon ESU as endangered on March 24, 1999 (64 FR 14308), reaffirmed this status on June 28, 2005 (70 FR 37160), and maintained its endangered status after the ESU's 5-year review (76 FR 50448, August 15, 2011). "Take" of the species is prohibited by section 9 of the ESA under most circumstances as defined in the ESA.

The listed ESU currently includes all naturally spawned populations of spring-run Chinook salmon in accessible reaches of Columbia River tributaries between Rock Island and

Chief Joseph Dams, excluding the Okanogan River¹. Listed spring-run Chinook salmon from this ESU currently spawn in three river subbasins in eastern Washington: the Methow, Entiat and Wenatchee. A fourth population historically inhabited the Okanogan River subbasin, but was extirpated in the 1930s because of overfishing, hydropower development, and habitat degradation (NMFS 2007). The listed UCR Chinook salmon ESU also includes six artificial propagation programs: the Twisp River, Chewuch River, Methow Composite, Winthrop National Fish Hatchery, Chiwawa River, and White River spring Chinook salmon hatchery programs.

On October 9, 2007, we adopted a final recovery plan for the UCR Chinook salmon ESU (72 FR 57303). The recovery plan identifies re-establishment of a population in the Okanogan River subbasin as a recovery action (NMFS 2007). More specifically, the recovery plan explains that re-establishment of a spring-run Chinook salmon population in the Okanogan River subbasin would aid recovery of this ESU by increasing abundance, by improving spatial structure, and by reducing the risk of extinction to the ESU as a whole.

On November 22, 2010, we received a letter from the Confederated Tribes of the Colville Reservation (CTCR) requesting that we authorize the release of an experimental population of spring-run Chinook salmon in the Okanogan River subbasin. The CTCR has also initiated discussions on this topic with the U.S. Fish and Wildlife Service (USFWS), the Bonneville Power Administration, the Army Corps of Engineers, the Bureau of Reclamation, the Washington Department of Fish and Wildlife (WDFW), and the Okanogan Nations Alliance of Canada. The CTCR's request included a large amount of information on the biology of UCR

¹ The Okanogan River is a major tributary of the upper Columbia River, entering the Columbia River between Wells and Chief Joseph Dams. The majority of the Okanogan River subbasin is in Canada (74 percent) with the remainder in Washington State (26 percent).

Chinook salmon and the possible management implications of releasing an experimental population in the Okanogan subbasin.

Statutory and Regulatory Framework for Experimental Populations

Section 10(j) of the ESA, entitled “Experimental Populations,” allows the Secretary to authorize the release of populations of listed species outside their current range if the release would “further the conservation” of the listed species. An “experimental population” is defined by the statute in section 10(j)(1) as one authorized for release, “but only when and at such times as, the population is wholly separate geographically from the nonexperimental populations of the same species.”

Before authorizing the release of an experimental population, section 10(j)(2)(B) requires that we must “by regulation identify the population and determine, on the basis of the best available information, whether or not the population is essential to the continued existence of the species.”

An experimental population is treated as a “threatened species,” except that “non-essential populations” do not receive the benefit of certain protections normally applicable to threatened species (ESA Section 10(j)(2)(C)). Below we discuss the impact of treating experimental populations as threatened species, and of exceptions that apply to NEPs.

For endangered species, section 9 of the ESA automatically prohibits take. The ESA defines take to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. For threatened species, the ESA does not automatically extend the Section 9 take prohibitions, but instead authorizes the agency to adopt regulations it deems necessary and advisable for species conservation, including prohibiting take under section 4(d).

Where, as proposed here, we designate an experimental population of an endangered species, the automatic take prohibition no longer applies; however, because the experimental population is treated as threatened, we must issue protective 4(d) regulations for that population as we deem necessary and advisable for the conservation of the population. Such regulations may include take prohibitions.

Section 7 of the ESA provides for Federal interagency cooperation and consultation to conserve listed species, ensure survival, help in recovery of the species, and protect designated critical habitat. Section 7(a)(1) directs all Federal agencies to use their authorities to further the purposes of the ESA in aiding the recovery of listed species. Section 7(a)(2) requires all Federal agencies, in consultation with NMFS, to ensure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of designated critical habitat. Section 7 applies equally to endangered and threatened species.

Although ESA section 10(j) provides that an experimental population is treated as a threatened species, if the experimental population is deemed non-essential, section 10(j)(C) requires that we apply the section 7(a)(4) consultation provisions to the NEP as if the NEP were a species proposed to be listed, rather than a species that is listed (unless it is located within a National Wildlife Refuge or National Park, in which case it is treated as listed). This means that the section 7(a)(2) consultation requirement would not apply to Federal agency actions affecting the NEP. Formal consultation may be required for actions in the Okanogan River NEP Area if there are effects on other ESA-listed species.

Only two provisions of ESA section 7 would apply to the proposed Okanogan NEP: section 7(a)(1) and section 7(a)(4). Section 7(a)(1) requires Federal agencies to use their

authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with NMFS on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory and do not restrict agencies from carrying out, funding, or authorizing activities.

The USFWS has authorized many experimental populations and developed regulations to implement section 10(j), which can be found at 50 CFR 17.80 through 17.84. We have not promulgated regulations implementing section 10(j) of the ESA, and the USFWS regulations do not govern NMFS' 10(j) authorizations. However, we considered USFWS regulations where appropriate in making the required statutory determinations under section 10(j) and in formulating this proposed rule. The USFWS implementing regulations contain the following provisions:

The USFWS regulations define an essential experimental population as one “whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.” All other experimental populations are classified as non-essential (50 CFR 17.81). This definition was apparently directly derived from the legislative history to the ESA amendments that created section 10(j).

In determining whether the experimental population will further the conservation of the species, the USFWS regulations require that agency to consider: (1) any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere; (2) the likelihood that any such experimental population will become established and survive in the foreseeable future; (3) the relative effects that establishing an experimental population will have on the recovery of the species; and (4) the extent to which the

introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area (50 CFR 17.81(b)).

USFWS regulations at 50 CFR 17.81(c) also describe four components that must be provided in any USFWS regulations promulgated with regard to an experimental population under section 10(j). The components are: (1) appropriate means to identify the experimental population, including its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s); (2) a finding of whether the experimental population is, or is not, essential to the continued existence of the species in the wild; (3) management restrictions, protective measures, or other special management concerns of that population, which may include measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and (4) a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

As indicated, we are not bound by the USFWS regulations but we consider them as appropriate in the course of making the statutorily mandated determinations found in ESA section 10(j). To summarize, the statute requires that we determine: (1) whether the release will further the conservation of the species, and (2) whether the population is essential or non-essential. In addition, because section 10(j) provides that the population will only be experimental when and at such times it is wholly separate geographically from nonexperimental populations of the same species, we must establish that there are such times and places when the experimental population is wholly geographically separate. Similarly, the statute requires that we identify the experimental population; the legislative history indicates that the purpose of this requirement is to provide notice as to which populations of listed species are experimental (See,

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP NO. 97-835, AT 15 (1982)).

Status of the Species

UCR Chinook salmon are anadromous fish that migrate as adults from the ocean during the spring to spawn in freshwater streams where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. At spawning, adults pair to lay and fertilize thousands of eggs in freshwater gravel nests or “redds” excavated by females. Depending on temperatures, eggs incubate for several weeks to months before hatching as “alevins” (a larval life stage dependent on food stored in a yolk sac). Following yolk sac absorption, alevins emerge from the gravel as young juveniles called “fry” and begin actively feeding. UCR Chinook salmon juveniles spend a year in freshwater areas before migrating to the ocean. The physiological and behavioral changes required for the transition to salt water result in a distinct “smolt” stage. On their journey to the ocean juveniles migrate downstream through a riverine and estuarine corridor between their natal lake or stream and the ocean.

After 2 to 3 years in the ocean, adult UCR Chinook salmon begin returning from the ocean in the early spring, with the run into the Columbia River peaking in mid-May (NMFS 2007). Spring-run Chinook salmon enter the upper Columbia River tributaries from April through July. After migration, they hold in these tributaries until spawning occurs in the late summer, peaking in mid to late August.

Section 4(f) of the ESA requires the Secretary of Commerce to develop recovery plans for all listed species unless the Secretary determines that such a plan will not promote the conservation of a listed species. Prior to developing recovery plans for salmon in the interior Columbia River Basin, we assembled a team of scientists from Federal and state agencies, tribes,

and academia. This group, known as the Interior Columbia Technical Recovery Team (ICTRT), was tasked with identifying population structure and recommending recovery criteria (also known as delisting criteria) for ESA-listed salmon and steelhead in the Middle Columbia, Upper Columbia, and Snake River basins. The ICTRT recommended specific abundance and productivity goals for each population in the UCR Chinook salmon ESU. The team also identified the current risk level of each population based on the gap between recent abundance and productivity and the desired recovery goals. The ICTRT (2008) considered all three extant populations to be at high risk of extinction based on their current abundance and productivity levels.

The ICTRT also recommended spatial structure and diversity metrics for each natural population (ICTRT 2007). Spatial structure refers to the geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (e.g., a single landslide) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas containing the expression of diverse life history characteristics. Diversity is the phenotypic (morphology, behavior, and life-history traits) and genotypic (DNA) characteristics within and between populations. Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity, on the other hand, provides populations with the ability to survive long-term changes in the environment by providing genetic variations that may prove successful under different situations. It is the combination of phenotypic and genotypic diversity expressed in a natural setting that provides populations with the ability to utilize the full range of habitat

and environmental conditions and to have the resiliency to survive and adapt to long-term changes in the environment. The mixing of hatchery fish (or excessive numbers of out-of-basin stocks) with naturally produced fish on spawning grounds can decrease genetic diversity within a population (NMFS 2007). The ICTRT (2008) considers all three extant populations of this ESU at high risk of extinction based on their current lack of spatial structure and diversity.

On March 18, 2010, we announced the initiation of 5-year status reviews for 16 ESUs of Pacific salmon including the UCR Chinook salmon ESU (75 FR 13082). As part of this review, our Northwest Fisheries Science Center compiled and issued a report on the newest scientific information on the viability of this ESU. The report states:

The Upper Columbia Spring-run Chinook salmon ESU is not currently meeting the viability criteria (adapted from the ICTRT) in the Upper Columbia Recovery Plan.

Increases in natural origin abundance relative to the extremely low spawning levels observed in the mid-1990s are encouraging; however, average productivity levels remain extremely low. Large-scale directed supplementation programs are underway in two of the three extant populations in the ESU. These programs are intended to mitigate short-term demographic risks while actions to improve natural productivity and capacity are implemented. While these programs may provide short-term demographic benefits, there are significant uncertainties regarding the long-term risks of relying on high levels of hatchery influence to maintain natural populations (Ford et al. 2010).

All extant populations are still considered to be at high risk of extinction based on the abundance/productivity and spatial structure/diversity metrics. When the risk levels for these attributes are integrated, the overall risk of extinction for this ESU is high (Ford et al. 2010).

Analysis of the Statutory Requirements

1. Will authorizing release of an Okanogan UCR Chinook salmon experimental population further the conservation of the species?

The ESA defines “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.” We discuss in more detail below each of the factors we considered in determining if release of an experimental population into the Okanogan River NEP Area would “further the conservation” of UCR Chinook salmon.

The consideration of whether authorizing release of an experimental population will further the conservation of the species raises various issues, including the potential negative effects to the ESU posed by the release; the likelihood that the experimental population will become established and self-sustaining; and the extent to which a self-sustaining experimental population reduces the threats to the ESU’s viability. The USFWS regulations also suggest considering whether the experimental population will be affected by other state- or federally-approved actions in the area. This last factor may not be subject to precise evaluation, but where possible we intend to take into account all factors such as other approved actions that affect whether a population can become established and self-sustaining.

An experimental population can lead to improved spatial structure of the species. Here, the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan contains specific management strategies for recovering UCR Chinook salmon that include securing existing populations and reintroducing spring-run Chinook salmon into historically occupied habitats in the Okanogan River. The plan concludes, and we continue to agree, that establishing an experimental population of UCR Chinook salmon in the Okanogan River that persist into the foreseeable future is expected to reduce the species’ overall extinction risk from natural and

anthropogenic factors by increasing its abundance, productivity, spatial structure, and diversity within the Upper Columbia River. These expected improvements in the overall viability of UCR Chinook salmon, in addition to other actions being implemented throughout the Columbia River migration corridor, will contribute to the species' near-term viability and recovery.

Regarding whether the release will result in a successful reintroduction, one issue to consider is what is the most appropriate source of broodstock to establish an experimental population, and is that source available? Reintroduction efforts have the best chance for success when the donor population has life history characteristics compatible with the anticipated environmental conditions of the habitat into which fish will be reintroduced (Araki et al. 2008). Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction, and therefore, only spring-run Chinook salmon populations found in the Upper Columbia River basin will be used in establishing the experimental population in the Okanogan River NEP Area.

Fish produced from the Methow Composite spring-run Chinook salmon program at Winthrop National Fish Hatchery are proposed to be the initial source of individuals to establish an experimental population of UCR Chinook salmon in the Okanogan River. These fish are from the neighboring river subbasin and have evolved in an environment similar to that of the Okanogan River NEP Area. They are likely to be the most similar genetically to the extirpated Okanogan spring-run Chinook salmon population. For the past several years, enough adult salmon from this hatchery program have returned to the Methow subbasin that excess eggs and sperm are available to begin raising fish for reintroduction into the Okanogan River NEP Area.

We also consider the suitability of habitat available to the experimental population. The Columbia basin as a whole is estimated to have supported pre-development spring-run Chinook

salmon returns as large as 588,000 fish (Chapman 1986). The UCR Chinook salmon ESU component of the Columbia basin is estimated to have comprised up to 68,900 fish (Mullan 1987; UCSRB 2007). The Okanogan population of the UCR Chinook salmon ESU is estimated to have historically contained at least 500 spring-run Chinook salmon (UCSRB 2007), and the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan estimates that the Okanogan still has the capacity for at least 500 spring-run Chinook salmon.

Over the past century, ecosystem processes in the Okanogan and other subbasins have been severely impacted, creating a fragmented mixture of altered or barren fish and wildlife habitats. Disruptions in the hydrologic system have resulted in widespread loss of migratory corridors and access to productive habitat (CTCR 2007). Low base stream flow and warm summer water temperatures have limited salmonid production both currently and historically. Stream flow and fish passage in the Okanogan subbasin are affected by a series of dams and water diversions.

The Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan nevertheless characterizes the Okanogan subbasin as having the potential to support a viable population of spring-run Chinook salmon (UCSRB 2007). The recovery plan establishes a framework for accomplishing restoration goals for the Okanogan subbasin including restoring connectivity throughout their historical range where feasible and practical. Short- and long-term actions will protect riparian habitat along spawning and rearing streams and establish, restore, and protect stream flows suitable for spawning, rearing, and migration. In addition, water quality will be protected and restored where feasible and practical. In the mainstem Columbia River, implementation of the Federal Columbia River Power System ESA section 7 Biological Opinion (NMFS 2008a, NMFS 2010) provides a number of new actions and continuation of existing

programs that will likely continue to increase passage survival through the Columbia River passage corridor.

Based on the available information, we believe that implementation of these actions will continue to improve habitat conditions in the Okanogan River NEP Area to support reestablishing a potential fourth independent population of UCR Chinook salmon. Salmon Creek and Omak Creek offer the best spawning and rearing habitat for natural production in the subbasin, and major efforts by the CTCR are underway to restore tributary habitat for spring-run Chinook salmon in both the U.S. and Canadian portions of the Okanogan subbasin.

In addition to actions taken under the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, there are many Federal and State laws and regulations that will also help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat. Section 404 of the Clean Water Act (CWA)(40 CFR parts 100 through 149) requires avoidance, minimization, and mitigation for the potential adverse effects of dredge and fill activities within the nation's waterways. Section 404(b) of the CWA requires that section 404 permits be granted only in the absence of practicable alternatives to the proposed project, that would have a less adverse impact on the aquatic ecosystem. CWA section 401 provides protection against adverse water quality conditions. In addition, construction and operational storm water runoff is subject to restrictions under CWA Section 402 and state water quality laws. Also, the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1801 et seq.), requires that Essential Fish Habitat (EFH) be identified, and Federal action agencies must consult with NMFS on any activity which they fund, permit, or carry out that may adversely affect EFH. Freshwater EFH for Chinook salmon in the Upper Columbia River basin includes the Okanogan subbasin, which is the area where this NEP would be introduced. For

each of these authorities, we do not assume complete implementation and compliance for all actions potentially affecting the experimental population or the listed ESU. However, we expect compliance and assume, at a minimum, that these authorities provide a regulatory regime that tends to encourage actions consistent with that regime.

The habitat improvement actions called for in the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, in combination with the protective measures proposed in this rule, as well as compliance with existing Federal, State and local laws, statutes, and regulations, including those mentioned above, are expected to contribute to the survival of the experimental population in the Okanogan River into the foreseeable future. Although any reintroduction effort is likely to require supplementation with hatchery-origin fish for several years, we conclude there is the potential for a population of spring-run Chinook salmon to become established. Furthermore, we conclude that such a self-sustaining population of genetically compatible individuals is likely to further the conservation of the species as discussed above.

2. Identification of the experimental population and geographic separation from the nonexperimental populations of the same species

ESA Section 10(j) requires that we identify the population by regulation and, as indicated, the Congressional intention was to provide notice as to which populations are experimental. The statute also provides that the population is only considered experimental when and at such times as it is wholly separate geographically from the nonexperimental populations of the same species. In this case, the analysis and information that identifies the population also demonstrates when and where it will be wholly geographically separate from other UCR Chinook salmon. Under this proposed rule, the experimental population would be

defined as the UCR Chinook salmon population released in the Okanogan River, and their subsequent progeny, when they are geographically located anywhere in the Okanogan River NEP Area. When juvenile Okanogan River UCR Chinook salmon pass downstream into the Columbia River to the Pacific Ocean, they would no longer be geographically separated from the other extant UCR Chinook salmon populations, and the “experimental” designation would not apply, unless and until they return as adults to spawn in the Okanogan subbasin.

More specifically, the released UCR Chinook salmon and their progeny would only be part of the experimental population when they are present in the Okanogan River NEP Area. UCR Chinook salmon would not be part of the experimental population when they are outside the Okanogan River NEP Area (including use of migration corridors and if they stray to other locations to spawn), even if they originated within the Okanogan River NEP Area.

The Okanogan River NEP Area provides the requisite level of geographic separation because spring-run Chinook salmon are currently extirpated from this area and straying of fish from other spring-run Chinook populations into this area is extremely low (Colville Business Council 2010). As a result, the ESU is defined to not include the Okanogan River and the status of the ESU does not rely on the Okanogan subbasin for recovery. If any other UCR Chinook salmon stray into the Okanogan River NEP Area, they would acquire experimental status while within that area (i.e., and therefore no longer be covered by the “endangered” listing, nor by the full range of section 9 prohibitions). Said another way, the “experimental” designation is geographically based and does not travel with the fish outside the Okanogan River NEP Area.

If the 10(j) authorization and designation were to occur, hatchery-origin fish used for the reintroduction would be marked, for example, with specific fin clips and/or coded-wire tags to evaluate the stray rate and allow for brood stock collection of returning NEP adults. It may be

possible to mark NEP juvenile fish released into the Okanogan River NEP Area in an alternative manner (other than coded-wire tags) that would distinguish them from other Chief Joseph Hatchery-raised Chinook salmon, and we will consider this during the Chief Joseph Hatchery annual review. During the Chief Joseph Hatchery annual review process, information on fish interactions and stray rates, productivity rates of hatchery-origin and natural-origin populations and harvest effects are analyzed and evaluated for consistency with best management practices for artificial production as developed by the Hatchery Scientific Review Group and other science groups in the Pacific Northwest. Any such clips or tags would not, however, be for the purpose of identifying the NEP since, as discussed above, the experimental population is identified based on the geographic location of the fish. Indeed, if the reintroduction is successful, and fish begin reproducing naturally, their offspring would not be distinguishable from fish from other Chinook salmon populations. Outside of the experimental population area, e.g., in the Columbia River below the Okanogan or in the ocean, any such unmarked fish (juveniles and adults alike) would not be considered members of experimental population. They would be considered part of the ESU currently listed as endangered. Likewise, any fish that were marked before release in the NEP area would not be considered part of the experimental population once they left the Okanogan River NEP Area; rather, they would be considered part of the ESU currently listed as endangered.

3. Is the Experimental Population Essential to the Continued Existence of the Species?

As discussed above, the ESA requires the Secretary, in authorizing the release of an experimental population, to determine whether the population would be “essential to the continued existence” of the ESU. The statute does not elaborate on how this determination is to be made. However, as noted above, Congress gave some further definition to the term when it

described an essential experimental population as one whose loss “would be likely to appreciably reduce the likelihood of the survival of the species in the wild.” (see, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 97-835, at 15 (1982)). The USFWS incorporated this concept into its definition of an essential population.

Based on the best available information, as required by ESA section 10(j)(2)(B), we conclude that the proposed experimental population would not be one whose loss would be likely to appreciably reduce the likelihood of survival of the UCR Chinook salmon ESU.

The Upper Columbia Salmon and Steelhead Recovery Plan states that recovery of spring-run Chinook salmon in the Okanogan subbasin is not a requirement for delisting. Based on the recovery plan’s recovery criteria and proposed management strategies, the UCR Chinook salmon ESU could recover to the point where listing under the ESA is no longer necessary, solely with contributions from the three extant populations. Specifically, if the Wenatchee and Methow populations could achieve a 12-year geometric mean abundance of 2,000 natural-origin fish and the Entiat population reaches a 12-year geometric mean abundance of 500 natural-origin fish, the UCR Chinook salmon ESU would meet the recovery criteria for abundance. This would require a minimum productivity of between 1.2 and 1.4 recruits per spawner for the 12-year time period (NMFS 2007). The extant populations would also need to meet other specific criteria, identified in the recovery plan, which would result in a moderate or lower risk for spatial structure and diversity. The Upper Columbia Salmon and Steelhead Recovery Plan identifies several harvest, hatchery management, hydropower and habitat related actions that could be taken to improve viability of the three extant UCR Chinook salmon populations.

The Upper Columbia Salmon and Steelhead Recovery Plan estimates recovery of the UCR Chinook salmon ESU will take 10 to 30 years without the addition of the Okanogan

population. Based on the best available current evidence and information, we conclude that recovery of the UCR Chinook salmon ESU is still likely under the above-discussed conditions.

NMFS' 2011 5-year review states that even though there has been an increase in abundance and a decrease in productivity of the UCR Chinook salmon ESU, information considered in the review does not indicate a change in the biological extinction risk category since the last status review in 2005. Neither status review considered the potential for spring-run Chinook salmon in the Okanogan subbasin to alter this risk, because spring-run Chinook salmon were extirpated from the Okanogan subbasin in the 1930s and no spring-run Chinook salmon currently exist in the Okanogan subbasin. The status reviews only evaluated the status of the extant Wenatchee, Entiat, and Methow spring-run Chinook salmon populations.

In summary then, even without the establishment of an Okanogan population, the UCR Chinook salmon ESU could possibly be delisted, if all threats were being addressed and the species was otherwise recovered in all three existing populations. Because we conclude that a population of UCR Chinook salmon in the Okanogan River NEP Area is not essential for conservation of the ESU, we conclude the proper designation is as an NEP. Under Section 10(j)(2)(C)(ii) of the ESA we cannot designate critical habitat for a NEP.

Additional Management Restrictions, Protective Measures, and Other Special Management Considerations

As indicated above, section 10(j) requires that experimental populations be treated as threatened species, except for certain portions of section 7 (Section 10(j)(2)(C)) and the fact that critical habitat designation is not required. Congress intended that this provision would authorize us to issue regulations we deemed necessary and advisable to provide for the conservation of the experimental population just as it does, under section 4(d), for any threatened species (JOINT

EXPLANATORY STATEMENT, supra, at 15). In addition, when amending the ESA to add section 10(j), Congress specifically intended to provide broad discretion and flexibility to the Secretary in managing experimental populations so as to reduce opposition to releasing listed species outside their current range (H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)). Therefore, we propose to exercise the authority to issue protective regulations under section 4(d) for the proposed NEP to identify take prohibitions necessary to provide for the conservation of the species and otherwise provide assurances to people in the NEP area.

The ESA defines “take” to mean: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Concurrent with the ESA section 10(j) authorization, we propose protective regulations under ESA section 4(d) for the experimental population that would prohibit take of UCR Chinook salmon that are part of the experimental population except in the following circumstances in the Okanogan River NEP Area:

1. Any activity taken pursuant to a valid permit issued by us under 50 CFR 223.203(b)(1) and 223.203(b)(7) for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes.
2. Aid, disposal, and salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3).
3. Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan (HGMP) that complies with the requirements of 50 CFR 223.203(b)(5).

4. Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan that complies with the requirements of 50 CFR 223.204.
5. Any harvest-related activity consistent with State harvest regulations and an approved Fishery Management Evaluation Plan that complies with the requirements of 50 CFR 223.203(b)(4).
6. Any take that is incidental² to an otherwise lawful activity. Otherwise lawful activities include, but are not limited to, agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations.

Outside the Okanogan River NEP Area, UCR spring-run Chinook are not considered to be part of the NEP (even if they originated there), and therefore the take prohibitions applicable to non-experimental UCR Chinook salmon apply.

Process for Periodic Review

If we authorize the release of an experimental population under section 10(j), the success of the reintroduction is likely to be assessed by certain ongoing monitoring programs and new programs developed specifically for this purpose. The CTCR request identifies ongoing monitoring and evaluation programs such as the WDFW monitoring program at Wells Dam (located on the mainstem Columbia River downstream of the confluence with the Methow River) that could be slightly modified to include monitoring of the proposed experimental population.

² Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. See 50 CFR 402.02.

The CTCR request also identifies their commitment to additional monitoring in the Okanogan subbasin, including spawning ground and carcass surveys, weir counts, and video surveillance at Zosel Dam (located at river mile 79 of the Okanogan River, just south of Osoyoos Lake and the U.S.–Canada border). As data are collected through these monitoring efforts, NMFS, the CTCR, and other potential project partners can evaluate the success of the program. In addition, results of the reintroduction project will be evaluated during the next 5-year status review for the UCR Chinook salmon ESU in about 2016.

Proposed Determinations

Based on the best available scientific information, we determine that the release of a NEP of UCR Chinook salmon in the Okanogan River NEP Area will further the conservation of UCR Chinook salmon. Fish used for the reintroduction will come from the Methow Composite hatchery program located at Winthrop National Fish Hatchery. These fish are included in the UCR spring-run Chinook salmon ESU and have the best chance to survive and adapt to conditions in the Okanogan River subbasin (Jones et al. 2011). They are expected to remain geographically separate from the UCR Chinook salmon ESU during the life stages in which they remain in or return to the Okanogan River; at all times when members of the NEP are downstream of the confluence of the Okanogan and Columbia Rivers, the experimental designation will not apply. Establishment of a fourth population of UCR Chinook salmon in the Okanogan would likely contribute to the viability of the ESU as a whole. This experimental population release is being implemented as recommended in the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, while at the same time ensuring that the reintroduction would not impose undue regulatory restrictions on landowners and third parties.

We further determine, based on the best available scientific information, that the proposed experimental population would not be essential to the ESU, because absence of the experimental population would not reduce the likelihood of survival of the ESU. An Okanogan spring-run Chinook salmon population is not a requirement for delisting because the population is extirpated. Implementation of habitat actions in the Upper Columbia Salmon and Steelhead Recovery Plan are expected to increase the viability of the Methow, Wenatchee, and Entiat populations to meet ESU recovery criteria without establishment of an Okanogan population. We therefore propose that the released population be designated a Non-Essential Population.

Public Comment

We want the final rule to be as effective and accurate as possible, and the final EA to evaluate the potential issues and reasonable range of alternatives. Therefore, we invite the public, State, Tribal, and government agencies, the scientific community, environmental groups, industry, local landowners, and all interested parties to provide comments on the proposed rule and draft EA (see ADDRESSES section above). We request that submitted comments be relevant to the proposed release of an experimental population designation and not include comments on the Upper Columbia Chinook Salmon and Steelhead Recovery Plan or Okanogan subbasin HGMP, which are beyond the scope of the action described in this proposed rule. Comments should be as specific as possible, provide relevant information or suggested changes, the basis for the suggested changes, and any additional supporting information where appropriate. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Prior to issuing a final rule, we will take into consideration the comments and supporting materials received. The final rule may differ from the proposed rule based on this information and other considerations. We are interested in all public comments, but are specifically interested in obtaining feedback on:

- (1) Whether the Methow Composite stock of UCR Chinook salmon is the best fish to use in establishing an experimental population and the scientific basis for your comment.
- (2) The proposed geographical boundary of the experimental population.
- (3) The extent to which the experimental population would be affected by current or future Federal, State, Tribal, or private actions within or adjacent to the experimental population area.
- (4) Any necessary management restrictions, protective measures, or other management measures that we may not have considered.
- (5) The likelihood that the experimental population will become established in the Okanogan River NEP Area.
- (6) Whether the proposed experimental population is essential or nonessential.
- (7) Whether the proposed designation furthers the conservation of the species and we have used the best available science in making this determination.

Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the Information Quality Act (Section 515 of Public Law 106-554) published in the Federal Register on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to

certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this proposed rule that meet these criteria.

Classification

Executive Order 12866

This proposed rule has been determined to be not significant under Executive Order (E.O.) 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

We are certifying that this proposed rule, if implemented, would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This proposal would designate and authorize the release of a nonessential experimental population of Upper Columbia River spring-run Chinook salmon into the Okanogan River subbasin. While in the subbasin, the NEP would be protected from some types of take, but we would impose no prohibitions on the incidental take of the NEP pursuant to otherwise legal activities (see below). The effect of the proposal would not increase the regulatory burdens associated with the ESA on affected entities, including small entities, to conduct otherwise lawful activities as a result of reintroduction of UCR Chinook salmon to the Okanogan River NEP Area.. If this proposal is adopted, the area affected by this rule includes the entire Okanogan River subbasin to the extent that it occurs in Washington state. Private land ownership is significant in the NEP area. Land uses are primarily agriculture, livestock grazing, and suburban development. Accordingly, the rule, if implemented, may impact those uses.

However, this proposed rule would apply only limited take prohibitions as compared with the prohibitions that typically apply to listed UCR Chinook salmon; in particular, the proposed rule expressly allows take of NEP fish provided that the take is unintentional, not due to negligent conduct and incidental to otherwise lawful activity (such as recreational, agriculture, and municipal usage), and also allows take in other specified activities, such as tribal or state-regulated harvest. Under the proposed rule, there would only be the requirement to confer under ESA section 7, but not the more burdensome requirement to consult with respect to the NEP, and no critical habitat could be designated for the NEP. Because of the minimal regulatory overlay provided by this NEP designation, we do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the NEP area.

Because this proposal would require no additional regulatory requirements on small entities and would impose little to no regulatory requirements for activities within the affected

area, the Chief Council for Regulation certified that this proposed rule would not have a significant economic effect on a substantial number of small entities. Accordingly, no initial regulatory flexibility analysis is required, and none has been prepared.

Executive Order 12630

In accordance with E.O. 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required because this proposed rule: (1) would not effectively compel a property owner to have the government physically invade their property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Executive Order 13132

In accordance with E.O. 13132, we have determined that this proposed rule does not have federalism implications as that term is defined in E.O. 13132.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.):

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this proposed rule. We have prepared a draft EA on this proposed action and have made it available for public inspection (see ADDRESSES section above). All appropriate NEPA documents will be finalized before this rule is finalized.

Government-to-Government Relationship with Tribes (E.O. 13175)

E.O. 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes) we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

The CTCR Reservation lies within the experimental population area. In 2010 staff members of CTCR met with NMFS' Northwest Region (NWR) Protected Resources Division staff. They discussed the Tribe's developing proposal to re-introduce spring Chinook salmon in the Okanogan subbasin and designate it as a 10(j) experimental population.

Since that meeting CTCR and NWR staffs have been in frequent contact, including to explain the rule-making process and evaluate any proposal from the Tribes. These contacts and conversations included working together on public meetings held in Okanogan and Omak, WA (December 5, 2011), and monthly status/update calls describing activity associated with the NEPA and ESA reviews associated with the proposal.

In addition to frequent contact and coordination among CTCR and senior NMFS technical and policy staff, we also discussed hatchery production changes affected by the Chief Joseph Hatchery and the associated aspects of the 10(j) proposal with the Parties to U.S. v Oregon (Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, and the Shoshone-Bannock Tribes of the Fort Hall Reservation; the States of Washington, Oregon, and Idaho; and the United States (NMFS, USFWS, Bureau of Indian Affairs, and the Department of Justice)). The current 2008-2017 United States v. Oregon Management Agreement (2008) anticipated the development of the Chief Joseph Hatchery. Footnote #5 to Table B-1 Spring Chinook Production for Brood Years 2008-2017 states that the parties to the Agreement “anticipate that the proposed Chief Joseph Hatchery is likely to begin operations during the term of this Agreement. The Parties agree to develop options for providing ... spring Chinook salmon eggs to initiate the Chief Joseph program when it comes online.” (p. 99). This will include coordinating with the “Production Advisory Committee” (PAC) which is responsible to “coordinate information, review and analyze ... future natural and artificial production programs ... and to submit recommendations to the management entities.” (p. 14) The U.S. v. Oregon Policy Committee, in February 2012, approved changes to the Agreement that identified the marking and transfer of 200,000 pre-smolts to Okanogan River acclimation ponds, and the prioritization of this production, in relation to other hatchery programs in the Methow River subbasin. The footnote has been modified to reflect these changes. The PAC includes technical representatives from “... the Warm Springs Tribe, the Umatilla Tribes, the Nez Perce Tribe, the Yakama Nation, and the Shoshone-Bannock Tribes.” (p.14). It is these technical representatives who will review adult management proposals associated with this

proposed rule. Those representatives are senior staff from the identified tribes and will be in communication with their respective governments. We invite meetings with tribes to have detailed discussions that could lead to government-to-government consultation meetings with tribal governments. We will continue to coordinate with the affected tribes as we gather public comment on this proposed rule and consider next steps.

References Cited

A complete list of all references cited in this proposed rule is available upon request from National Marine Fisheries Service office (see FOR FURTHER INFORMATION CONTACT).

Dated: October 17, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports.

For the reasons set out in the preamble, we propose to amend part 223 of chapter 1, title 50 of the Code of Federal Regulations, as set forth below.

Part 223--THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531-1543; subpart B, § 223.201-202 also issued under 16 U.S.C. 1361 et seq.; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102 the table for “Enumeration of threatened marine and anadromous species” add the entry for (c)(30) to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

Species ¹		Where listed	Citation(s) for listing determination	Citation(s) for critical habitat designation(s)
Common Name	Scientific Name			

(30) Upper Columbia River spring-run Chinook salmon (non-essential experimental population)	<u>Oncorhynchus tshawytscha</u>	U.S.A. -WA, only when, and at such times, as they are found in the mainstem or tributaries of the Okanogan River from the Canada-United States border to the confluence of the Okanogan River with the	Insert FEDERAL REGISTER citation and date when published as a final rule]	N/A

		Columbia River, Washington		

3. In § 223.301, add paragraph (c) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

* * * * *

(c) Okanogan River UCR spring-run Chinook Salmon Experimental Population (Oncorhynchus tshawytscha).

(1) Upper Columbia River (UCR) spring-run Chinook salmon located in the geographic area identified in paragraph (c)(5) of this section shall comprise the Okanogan River nonessential experimental population (NEP).

(2) Prohibitions. Except as provided in paragraph (c)(3) of this section, the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) relating to endangered species apply to UCR spring-run Chinook salmon in the NEP area identified in paragraph (c)(5) of this section.

(3) Take of this species that is allowed in the NEP Area. Taking of UCR spring-run Chinook salmon that is otherwise prohibited by paragraph (c)(2) of this section and 50 CFR 223.203(a) in the NEP area identified in paragraph (c)(5) of this section is allowed, provided it falls within one of the following categories:

- (i) Any activity taken pursuant to a valid permit issued by us under 50 CFR 223.203(b)(1) and §223.203(b)(7) for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes.

- (ii) Aid, disposal, and salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3);
- (iii) Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan that complies with the requirements of 50 CFR 223.203(b)(5).
- (iv) Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan that complies with the requirements of 50 CFR 223.204.
- (v) Any harvest-related activity consistent with state harvest regulations and an approved Fishery Management Evaluation Plan that complies with the requirements of 50 CFR 223.203(b)(4).
- (vi) Any take that is incidental to an otherwise lawful activity, provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of the otherwise lawful activity. Otherwise lawful activities include agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations.

(4) Prohibited take outside the NEP area. Outside the NEP Area, UCR spring-run Chinook are not considered to be part of the NEP, irrespective of their origin, and therefore the take prohibitions for non-experimental UCR Chinook salmon apply.

(5) Okanogan River NEP Area. The geographic boundary defining the Okanogan River NEP Area for UCR spring-run Chinook salmon is the mainstem and all tributaries of the

Okanogan River between the Canada-United States border to the confluence of the Okanogan River with the Columbia River. All UCR Chinook salmon in this defined NEP area are considered part of the Okanogan River NEP Area, irrespective of where they originated. Conversely, when UCR spring-run Chinook salmon are outside this defined Okanogan River NEP Area, they are not considered part of the Okanogan River NEP.

[FR Doc. 2013-24845 Filed 10/23/2013 at 8:45 am; Publication Date: 10/24/2013]